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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1467

ITT LAMP DIVISION OF THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Petitioner,

vs.

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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vs.

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, ITT Lamp Division of the International Telephone and Telegraph Corporation, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the First Circuit entered in this case on December 14, 1970.

OPINION BELOW.

The opinion of the United States Court of Appeals for the First Circuit (App. A) is not yet officially reported. The opinion of the District Court for the District of Massachusetts (App. C) is not officially reported.

JURISDICTION.

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the First Circuit, entered December 14, 1970 (App. B), is invoked under the provisions of 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

Whether the Commonwealth of Massachusetts can, in derogation of the Congressional policy of free collective bargaining, provide welfare benefits to individuals who deliberately refuse available employment by engaging in an economic strike?

CONSTITUTIONAL PROVISION INVOLVED.

Article VI of the United States Constitution is set forth in Appendix D.

STATUTES INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 141 et seq.), the Massachusetts General Welfare and Aid to Families with Dependent Children Acts (Mass. G. L. c. 117 and 118) and the Social Security Act of 1935, 49 Stat. 620, as amended (42 U. C. S. §§ 301-1394), are set forth in Appendix E.

STATEMENT OF THE CASE.

ITT Lamp Division (hereinafter called "Employer" or "ITT") manufactures incandescent and fluorescent lamps at its plant in Lynn, Massachusetts. Truck Drivers, Chauffeurs, Helpers, Local No. 42, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called "Union"), is the exclusive collective bargaining representative for the approximately six hundred and sixty production employees at the Lynn plant.

After several months of bargaining for an initial collective bargaining agreement, ITT and the Union reached an impasse in their negotiations. On August 24, 1970, the Union called a strike to enforce its demands. The strike continued for several months. There was a complete cessation of ITT's operations causing economic loss to the Employer. The strikers also felt the economic disadvantages of the strike. In order to alleviate their economic disadvantages, approximately one hundred and seventy, or twenty-five per cent, of the striking employees applied for and received welfare benefits under the Massachusetts statutes providing General Welfare and Aid to Families with Dependent Children. Mass. G. L. c 117, 118.[1]

Because of the significant alteration of bargaining power, ITT brought suit in the District Court for the District of Massachusetts to enjoin the payment of any welfare benefits solely because of the strike. Then, as now, ITT contended that the payment of welfare benefits to strikers by the Commonwealth of Massachusetts constituted an inter-

1. The Massachusetts Aid to Families with Dependent Children statute is part of a comprehensive federal plan of providing assistance to needy families and must comply with the minimal requirements Congress has established. 42 U. S. C. § 602, *et seq.*

ference with its right to engage in full and free collective bargaining. ITT alleged—and it has never been denied—that such payments prolonged the strike and constituted a governmental subsidy to the Union. The District Court denied the Employer's Motion for a Temporary Restraining Order and the First Circuit Court of Appeals affirmed.[2]

REASONS FOR GRANTING THE WRIT.

I. FEDERAL LABOR LAW GUARANTEES EMPLOYERS AND UNIONS THE RIGHT TO ENGAGE IN COLLECTIVE BARGAINING FREE FROM STATE INTERFERENCE.

This case, as the First Circuit noted, involves "the first occasion on which a federal court has considered a confrontation between the national policy of free collective bargaining and the administration of a state's welfare law" (App. A. p. A3, A4).[3] By upholding state payment of welfare benefits to economic strikers, the First Circuit has permitted Massachusetts to interfere with the process of free collective bargaining by directly subsidizing the exercise of one party's economic weapons.

National labor law is predicated on free collective bargaining. *H. K. Porter Co.* v. *NLRB,* 397 U. S. 99, 108 (1970); *NLRB* v. *American National Insurance,* 343 U. S. 395 (1952). The core of this process is the right to strike. *Division 1287, Amalgamated Assn. of Street Electrical*

2. The order of the District Court was taken after a full presentation by both parties, had the effect of a denial of an injunction, and is therefore properly before this Court for review. See, *United States* v. *Cities Service Co.,* 410 F. 2d 662 (1st Cir. 1969); *Dikworth* v. *River,* 343 F. 2d 226 (5th Cir. 1965).

3. Similar issues have been raised in state court proceedings: *Lascaris* v. *Wyman,* 305 N. Y. S. 2d 212 (N. Y. Sup. Ct. 1969); and *Strat-O-Seal Mfg. Co.* v. *Scott,* 72 Ill. App. 2d 480, 218 N. E. 2d 227 (Ill. App. 1966).

Railway & Motor Coach Employees of America v. *State of Missouri,* 374 U. S. 74, 81 (1963). Congress and this Court have recognized that economic weapons are inherent in the collective bargaining process. *NLRB* v. *Insurance Agents Union,* 361 U. S. 477 (1960); *American Ship Building* v. *NLRB,* 380 U. S. 300 (1965). As noted in *Insurance Agents,* "the presence of economic weapons in reserve, and their actual exercise on occasion . . . is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB* v. *Insurance Agents Union,* 361 U. S. at 489.

The recognition that the presence of economic weapons is inherent to our system of free collective bargaining requires the corollary recognition that government intervention in this area is prohibited. This Court has recognized on numerous occasions that Congress left employers and unions free "to establish, through collective negotiations their own charter for the ordering of industrial relations" and that any interference with this process must be rejected. *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U. S. 283, 295 (1959).

In *Insurance Agents,* for example, this Court struck down an attempt to interfere with the collective bargaining process through the regulation of one party's exercise of its economic weapons. Justice Brennan stated:

> ". . . [I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. . . . Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S. Rep. No. 105, 80th Cong. 1st Sess., p. 2. Nor does it contain a charter for . . . equalizing disparities of bargaining power between employer and union." 361 U. S. at 490.

To the same effect is this Court's declaration in *American Ship Building* that the NLRB may not "assess the relative economic power of the adversaries in the bargaining process and . . . deny weapons to one party or the other because of its assessment of that party's bargaining power." 380 U. S. at 317.

The availability of welfare benefits to economic strikers gives a union a potent weapon that impairs "the desired bilateral freedom of collective bargaining, left free by Congress." *John Hancock Mutual Life Insurance Company* v. *Commissioner of Insurance*, 349 Mass. 390, 208 N. E. 2d 516, 524-525 (1965). By providing welfare benefits to economic strikers, Massachusetts helps a union insist on its position with significantly less economic disadvantage to its members. Yet, as this Court has noted, "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *NLRB*, 380 U. S. at 309.

Surely the type of assistance Massachusetts provided the strikers of ITT in this case involve more than what the First Circuit described as a "tangential frustration of the national policy objective of unfettered collective bargaining." (App. A. p. A5.) Welfare payments, as President Nixon has noted, have a direct impact on the collective bargaining process.[4] They may prolong strikes by permitting strikers to withstand the economic disadvantages of the

4. Recognizing the imbalance created in collective bargaining by granting strikers economic assistance, the President made the following recommendation to Congress in light of the recent railroad labor dispute:

> "In addition, *and in order to move toward a balancing of economic pressures,* I am proposing a suspension of employment benefits for striking railroad employees, thus, moving toward an *equalization* of the economic pressures of such a strike." (Emphasis added.)

32 DLR E-I, 2(2-17-71)

strike. Welfare benefits to strikers, according to a leading union spokesman, were "one of the key contributions" to the success of the strike against General Electric.[5] Indeed, Massachusetts alone provided $2,307,823 in welfare benefits to over five thousand General Electric strikers.[6]

The potential impact on collective bargaining and the economy is staggering.[7] Rather than a system where the economic strength of the parties will influence the terms of an agreement, there will be a system where the strength of one of the parties is to a large extent based on state aid. Such a system is directly contrary to the concept that while the government "acts to oversee and referee the process of collective bargaining," it "leaves the results of the contest to the bargaining strength of the parties." *H. K. Porter Co.* v. *NLRB*, 397 U. S. at 107-8.

II. THE PAYMENT OF WELFARE BENEFITS TO ECONOMIC STRIKERS INTRUDES INTO AN AREA CONGRESS HAS OCCUPIED TO THE FULL EXTENT OF ITS CONSTITUTIONAL POWER.

This case does not fall under the principles established by this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), as the Court below recognized (App. A, p. A5). *Garmon* and its progeny deal primarily with the problem of primary jurisdiction, i.e., the jurisdiction of states over matters "arguably subject" to the jurisdiction of the National Labor Relations Board. Unlike

5. Compton, "Victory at GE: How It Was Done," *The American Federationist*, July, 1970, p. 6.

6. Statement of Joseph W. Chamberlin, Director of Research Massachusetts Department of Public Welfare, reprinted in North Adams Transcript, February 4, 1970.

7. The Bureau of Labor Statistics reported that in 1970 the man-days lost because of strikes rose to 62 million, an increase of over 19 million from 1969 and the number of workers involved rose from 2,481,000 in 1969 to 3,300,000 in 1970. 6 DLR (January 11, 1971) at p. B-1, 2.

Garmon, this case does not involve the question of National Labor Relations Board jurisdiction, but the far different issue of whether a state can act in an area which Congress has occupied "to the full extent of its constitutional power." *Amalgamated Assn. of Street Electrical Railway & Motor Coach Employees of America* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 391 (1951).

The area of collective bargaining, with the strike at its core, is an area that Congress has occupied to the full extent of its constitutional power. This Court has on numerous occasions struck down state intrusion into this area of federal preeminence.

In *International Union of United Automobile, Aircraft and Agricultural Implement Workers of America* v. *O'Brien*, 339 U. S. 454 (1950), this Court invalidated a Michigan law relating to economic strikes on the ground that *"Congress occupied this field and closed it to state regulation."* (Emphasis added.)

Similarly, in *Local 24, International Brotherhood of Teamsters* v. *Oliver, supra*, this Court refused to apply an Ohio antitrust law to a provision in a collective bargaining agreement:

> "Since the federal law operates here, in an area [collective bargaining] where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." 358 U. S. at 296.

In *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. 390, 208 N. E. 2d 516 (1965), the Supreme Judicial Court of Massachusetts recognized the full extent to which Congress has occupied this field. Striking down a statute permitting owners of debit life insurance policies an additional grace period in the event

of a strike by an insurance company's collecting agents, the Court stated:

> "The legislation under consideration . . . gives the union a potent weapon which cannot fail unilaterally to restrict the desired bilateral freedom of collective bargaining, left free by Congress for the operation of economic forces. For the state to intrude into such an area designed to be kept free is as much a violation of Federal policy as it is for a state to attempt to regulate rights or duties specifically protected by the federal acts." *Id.* at 524-525.[8]

Allowing the payment of welfare benefits to economic strikers similarly disrupts the system of private ordering through free collective bargaining which Congress intended to be free from state interference. The payment of welfare benefits to economic strikers necessarily affects the balance of power in collective bargaining. As stated by Professor Archibald Cox, "any state law which affects [this] balance is inconsistent with the national labor policy embodied in the LMRA, and under the supremacy clause, cannot be applied in situations affecting interstate commerce. Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057, 1069 (1968).[9]

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8. Other decisions demonstrating the limits on state jurisdiction over labor relations matters are: *Nash* v. *Florida Industrial Commission*, 398 U. S. 235 (1967); *Weber* v. *Anheuser-Busch*, 384 U. S. 468 (1955); *General Electric* v. *Callahon*, 294 F. 2d 60 (1st Cir. 1961).

9. The fact that the interference with collective bargaining comes about through the application of a state welfare statute rather than a statute expressly covering labor relations does not excuse its intrusion into this area. As this Court has stated, the "test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963).

III. PAYMENT OF WELFARE BENEFITS TO ECONOMIC STRIKERS PURSUANT TO THE AID TO FAMILIES WITH DEPENDENT CHILDREN STATUTE IS CONTRARY TO THE INTENT OF CONGRESS.

Throughout the AFDC Act, it becomes evident that Congress intended to provide public assistance for individuals who, through no fault of their own, are unemployed and unable to support themselves or their families. Nowhere in either the federal or Massachusetts statutes concerning aid to dependent children of the unemployed (AFDC), or in the Massachusetts general assistance program, is there the slightest indication of an intent to make such aid or assistance available to persons whose need arises solely because of their or their parents' participation in a strike arising out of a labor dispute. On the contrary, the stated purposes of the Acts indicate that a primary goal of each is to encourage those persons who, through no fault of their own, have become unemployed to become self-sufficient. 42 U. S. C. § 607; Mass G. L. c. 117, 118. *Report of Senate Committee on Finance on ADC Benefits to Children of Unemployed Parents*, 87th Cong. 1st Sess. (1961, Rept. No. 165); *Hearings on H. R. 12080 Before the Senate Committee on Finance*, 90th Cong. 1st Sess. (1967), p. 264.

The entire thrust of the legislative history demonstrates that Congress had a two-fold purpose in providing AFDC benefits to children of unemployed fathers. One purpose was to provide aid to these families, while the second purpose, underlying the first, was to provide aid to individuals who would be attempting to secure employment during the time that aid was being granted. *Report of Senate Committee on Finance on ADC Benefits to Children of Unemployed Parents*, 87th Cong. 1st Sess. (1961, Rept. No. 165). Congress was attempting to provide aid to individuals who are involuntarily unemployed. And as Presi-

dent Nixon stated to Congress on July 8, 1969, "a worker who exercises his right to strike is not involuntarily unemployed." 115 Cong. Rec. 18537.

In its opinion, the First Circuit noted that while it did not attribute heavy weight to Congressional silence, it did consider silence significant "where a legislature has shown its capacity to speak" on an issue. Congress has, however, demonstrated that when it seeks to provide benefits to strikers it does so expressly. For example, the Food Stamp Act[10] expressly provides that it is not a refusal to accept employment to refuse to work at a plant during a strike.[11] No such provision is contained in the AFDC Act.

CONCLUSION.

On the basis of all the foregoing, Petitioner submits that the Court grant this Petition for Writ of Certiorari.

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10. Public Law 91-671, 84 Stat. 2048 (1971).

11. The amendments to the Food Stamp Act provide that "refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment". 7 U. S. C. A. § 2014(c).

APPENDIX A.

UNITED STATES COURT OF APPEALS

For the First Circuit.

No. 7720

ITT LAMP DIVISION OF THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

Plaintiff, Appellant,

v.

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,

Defendant, Appellee.

No. 7749

MAURICE CONCRETE PRODUCTS, INC.,

Plaintiff, Appellant,

v.

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,

Defendant, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTREE AND COFFIN, *Circuit Judges.*

OPINION OF THE COURT.

December 14, 1970.

COFFIN, *Circuit Judge.* These two cases,[1] combined for purposes of appeal, present the question whether the defendant Commissioner of the Massachusetts Department of Public Welfare is wrongfully intruding in a labor dispute by making available welfare benefits to strikers who otherwise qualify under Massachusetts statutes providing for General Welfare and Aid to Families with Dependent Children, Mass. G. L. c. 117 and 118. Plaintiffs claim that such state action alters the relative economic strength of the parties, thus entering a field preempted by the national policy guaranteeing free collective bargaining, in violation of the Supremacy Clause of the Constitution. Plaintiffs' motions for injunctive relief were denied, the district court finding no evidence of irreparable injury and no reasonable probability of success on the merits.[2] Although the strike against ITT was subsequently settled, the issue, we know from our own experience, has earlier vainly sought appellate review in this circuit and is likely again to be raised, bringing it close to the "recurring question" category, where significant public rights are involved and court review ought not, if possible, be avoided. *See So. Pac. Terminal Co. I. C. C. 219 U. S.* 498, 515-516 (1911) and *Marchand* v. *Director, U. S. Probation Office,* 421 F. 2d 331

1. Brought separately by the ITT Lamp Division of the International Telephone and Telegraph Corporation and Maurice Concrete Products, Inc.

2. The action of the court, though in response to a motion for temporary restraining order, was taken after a full presentation by both parties, *Austin* v. *Altman,* 332 F. 2d 273, 275 (2d Cir. 1964), and had the effect of a denial of an injunction, *see United States* v. *Cities Service Co.,* 410 F. 2d 662, 663 n. 1 (1st Cir. 1969), and is therefore appealable.

(1970). In any event, however, the appeal of Maurice Concrete presents the identical question.

Plaintiffs have not contended in their brief that the district court erred in finding that there was "no evidence to show to what extent the receipt of welfare payments will affect the continuation of the strike" but have based their claim of irreparable injury on the alleged interference with collective bargaining constituted by the present and prospective payments of welfare benefits.[3] Since at least one of the appeals presents a case where a substantial number of strikers might possibly have qualified for welfare, we prefer to accept plaintiffs' assumption that the issue of irreparable harm merges into and becomes indistinguishable from the issue of probable success on the merits. That is to say that if indeed it is probable that the present and prospective provision of welfare to indigent strikers would be held to frustrate the collective bargaining process, it is equally probable that irreparable injury would be suffered.

We therefore move to the question whether plaintiffs have demonstrated sufficient probability of prevailing on the merits. *Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 390 F. 2d 113, 115-116 (1st Cir.), *cert. denied*, 391 U. S. 914 (1968). So far as our research indicates, this is the first occasion on which a federal court has considered a confrontation between the national policy of free collective bar-

3. If plaintiffs' approach is not correct, they, in any case, have surely not established irreparable injury. Our record is almost bereft of any indication of significant impact on either plaintiff. In the ITT case, apparently 175 or about 25% of 660 striking employees had applied for welfare. In the Maurice Concrete case we have only the contrary assertions of counsel at argument that (1) a majority of 25 workers were receiving welfare and (2) only one worker was on welfare, and he because he was hit by a truck. There is no evidence of any relationship between the availability of welfare benefits to present or prospective striker recipients and the likelihod of prolongation of either strike.

approach to preemption followed by the Supreme Court, in which both the degree of conflict and the relative importance of the federal and state interests are assessed. Note, *Federal Preemption: Governmental Interests and the Role of the Supreme Court,* Duke L. J. 484, 510, 511 (1966). Where Congress has not clearly manifested its purpose to exclude state action which takes the form of exercise of its historic police powers, such state action will not be invalidated under the Supremacy Clause, "in the absence of persuasive reasons", *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963), or unless the administration of the state law "palpably infringes" upon the federal policy. *Southern Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 766 (1945). *See also Head* v. *New Mexico Bd. of Examiners*, 374 U. S. 424 (1963); *Buck* v. *California*, 343 U. S. 99 (1952)[8]

On neither count—the issue of extent of conflict or the relative strength of the federal and state interests—would we fell confident in any *a priori* judgment. A court would first have to determine the quantum of impact on collective bargaining stemming from the granting of welfare benefits to strikers. If this is found substantial a court would then have to weigh the impact on the state of declaring needy strikers and their families ineligible for welfare against the extent to which making them eligible stripped state government of its neutrality in a labor-management dispute.

Such weighing exercises could not be restricted to an

8. *Garmon* itself applies, within its area, the general approach, recognizing that on any issue of arguable conflict with sections 7 and 8, state action would nevertheless be tolerated where "the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act", 359 U. S. at 243, "[o]r where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U. S. at 244.

ad hoc exploration of the microcosm of these particular disputes. A court must deal with "classes of situations" and not "judgments on the impact of particular conflicts on the entire scheme of federal labor policy and administration", *Garmon, supra* at 242. Under such an approach, a court would be interested in how many states permit strikers to receive welfare; whether or not strikes tend to be of longer duration where welfare is received; and studies or expert testimony evaluating the impact of eligibility for benefits on the strikers' resolve; a comparison between strike benefits and welfare benefits; the impact of the requirement that welfare recipients accept suitable employment; how many strikers actually do receive welfare benefits; and a host of other factors. In addition, the state's legitimate interests must also be considered: its interests in minimizing hardship to families of strikers who have no other resources than the weekly pay check, its concern in avoiding conditions that could lead to violence, its interest in forestalling economic stagnation in local communities, etc.[9]

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9. We note that there may arise non-*Garmon* labor relations situations where the conflict between federal and state interests and their relative importance would be so clear as to render such an extended empirical exploration unnecessary. The Massachusetts Supreme Judicial Court considered such to be the case in *John Hancock Life Ins. Co.* v. *Comm. of Insurance*, 349 Mass. 390 (1965). In that decision the court invalidated a state statute protecting insurance policy holders by declaring a moratorium on the obligation to prepay premiums during a strike and a 31-day period following its termination. The court found, on the one hand, that this law "tips the balance in favor of the [striking] agents in any labor dispute" with an insurance company, 349 Mass. at 403, by depriving the employer of assets and actuarial data vital to its business, and by effectively frustrating the employer's right to replace workers who have struck. Moreover, the statute denies to non-striking agents their right ot refrain from concerted activities. On the other hand, the court noted that the "harm sought to be averted by this exercise of the police power does not clearly appear." 349 Mass. at 404.

This very catalogue of data relevant to a macrocosmic weighing, which a court, if called upon, would have to undertake, indicates the preferable forum to be the Congress. Congress would be particularly appropirate in resolving this issue. The activity allegedly intruding into federal labor policy is not solely a state activity but rather a joint state-federal program. Congress has established the minimal requirements with which participating state welfare plans must comply. 42 U. S. C. § 60, *et seq.* We do not attribute heavy weight to Congressional silence, but we would doubt that, if striker eligibility for welfare had a significant impact on labor-management relations, Congress would be unaware of that impact. Moreover, if the issue proves to be finely balanced, after weighing all the evidence, it may be a sufficient justification for upholding the state action that Congress is always free to provide specifically for preemption. *See Penn Dairies* v. *Milk Control Comm'n,* 318 U. S. 261, 275 (1943).

In sum, wholly apart from the inadequacy of the evidence before the district court, we have substantial doubt that a significant frustration of federal collective bargaining policy is effected by the granting of welfare benefits to indigent strikers or that, even so, the state interest is so insubstantial compared to the federal interest that Congress must be supposed to have deprived the state of such power to serve that interest. We accordingly hold that the district court did not err in concluding that plaintiffs' case did not have a sufficient probability of prevailing on the merits.

There remains for our consideration plaintiffs' contention that the granting of welfare benefits to strikers violates the provisions of the Massachusetts Welfare Statutes and its federal counterpart, in that strikers, having voluntarily left their jobs, are persons who have "without good cause . . . refused a bona fide offer of employment. . . ."

42 U. S. C. § 607(b)(1).[10] Plaintiffs tend in their argument to assume the very point in issue by equating a refusal to work with "fault" and absence of "good cause". But this is no less circular or more persuasive than the contrary assumption of the defendant, accepted by the district court, that exercising one's federally protected right to strike constitutes "good cause" to refuse employment.[11] And the federal scheme, as plaintiffs' reference to the Senate Finance Committee's Report makes clear, allows the state, without of course deciding the merits of a particular controversy, to make the determination of what is covered by "good cause", and what constitutes a "bona fide" offer of employment. Senate Committee on Finance, Rep. No. 165, 87th Cong., 1st Sess. p. 3 (1961), U. S. C. Cong. & Admin. News 1716, 1718.

The fact that the Massachusetts legislature has specifically made unemployment compensation unavailable to workers on strike, Mass. G. L. c. 151A, § 25, does not cast doubt on the Commissioner's determination. We observe first that welfare programs, supplying unmet subsistence needs to families without time limitation, address a more basic social need than does unemployment compensation, which attempts to cushion the shock of seasonal, cyclical, or technological unemployment by making available time-limited benefits to individual workers, varying in relation to their prior earnings and without reference to demon-

10. The complementary Massachusetts statute likewise renders a person ineligible if he "wilfully fails without good cause, as determined by the [welfare] department, to maintain his registration for work . . . or to accept a referral to or offer of suitable employment", Mass. G. L. c. 117, § 1B.

11. The middle ground, qualifying for welfare on a case-by-case basis only those strikers who are engaged in a "reasonable" strike, is almost unthinkable, necessarily requiring the Commissioner of Welfare to take sides in every labor dispute, an activity which we held impermissible in *General Electric* v. *Callahan*, 294 F. 2d 60 (1st Cir. 1961), *appeal dismissed*, 369 U. S. 832 (1962).

strated need. Secondly, we would not lightly expand the legislature's expressed negative in one piece of legislation to constitute an unexpressed proviso in another. Indeed silence on an issue where a legislature has shown its capacity to speak is all the more significant.

Plaintiffs' further reference to the legislative history behind the federal enactment is not particularly helpful. The passages they quote do support the proposition, which the court accepts, that welfare programs were not designed to aid those who do not seek employment. But strikers who receive benefits fully conform to this legislative intention, since, as we noted above, all recipients, strikers included, must register and accept available alternate work under Mass. G. L. c. 117, § 1B. Furthermore, the legislative history neither states, nor can be read to imply that strikers, as a group, are to be held ineligible for welfare benefits if they meet all qualifications set by the state.

In sum, therefore, we cannot say, as a matter of probability, that the Commissioner's administrative determination of striker eligibility for welfare is precluded by the relevant state or federal statutes.

Affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 7720.

ITT Lamp Division of the International Telephone and Telegraph Corporation,

Plaintiff, Appellant,

vs.

Stephen A. Minter, Commissioner of the Massachusetts Department of Public Welfare,

Defendant, Appellee.

JUDGMENT.

Entered: December 14, 1970.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is affirmed.

By the Court:

/s/ Dana H. Gallup,
Clerk.

Enter:

Aldrich, *Ch. J*

APPENDIX C.

UNITED STATES DISTRICT COURT

District of Massachusetts

ITT Lamp Division of the International Telephone and Telegraph Corporation, *vs.* Stephen A. Minter, Commissioner of the Massachusetts Department of Public Welfare.	Civil Action No. 70-1265-C.

MEMORANDUM OF OPINION ON MOTION FOR A TEMPORARY RESTRAINING ORDER.

September 30, 1970

FORD, *D. J.*

The plaintiff in this action for injunctive relief is a Delaware corporation engaged in interstate commerce. Since August 24, 1970 employees of plaintiff's Lynn plant, members of Truck Drivers, Chauffeurs, Helpers Local No. 42, have been on strike.

Some of the striking employees have applied for assistance and welfare benefits under Massachusetts G. L. Chapter 117 and 118. Defendant, who administers such benefits, has found certain applicants eligible and is ready to make payments of benefits to them. The case has been heard on plaintiff's motion for an order temporarily restraining defendant from making such payments.

Before a temporary restraining order can issue, plaintiff must show that it has a reasonable probability of prevailing on the merits after a full hearing of the case. Consequently, the court, without purporting to decide the issues finally, must consider the contentions of plaintiff.

Plaintiff argues that the making of welfare payments to striking workers amounts to an interference by the state with its right under the Labor Management Relations Act, 29 U. S. C. § 141, et seq. to engage freely in collective bargaining, and hence that under the doctrine of preemption the state is barred from granting such assistance. Even assuming that welfare assistance to striking workers may tend to give the strikers some advantage, the state here does not purport to intervene directly in any matter involving labor management relations. It is acting under an entirely separate program of providing for its citizens who are in need, a matter of vital state interest, and one in which the policy nad operation of the state program is closely coordinated with another federal statute providing for aid to families with dependent children, 42 U. S. C. § 601, et seq., under which the federal government provides a substantial part of the cost of the benefits furnished. Any effect this program may have on a particular labor-management dispute is indirect and peripheral. The court is not convinced that it would finally be held barred under the preemption doctrine.

Plaintiff further argues that the granting of benefits violates the Massachusetts statutes and the related federal statute, 42 U. S. C. § 601, et seq. It is argued that the strikers here (and their families) are not eligible because by striking they have voluntarily left their jobs and hence are persons who have "without good cause . . . refused a bona fide offer of employment." However, this is not a simple refusal to work. These workers in striking are engaged in a rightful activity which is legally protected by

various provisions of the Labor Management Relations Act. Again the court is not persuaded that one who exercises his legally protected right to strike is thereby refusing without good cause to accept offered employment. Moreover, the possible consequences to a union member of returning to work as a strike breaker may well constitute good cause for failing to return to work.

Plaintiff argues that because striking workers are not eligible for unemployment insurance benefits, they should equally be barred from welfare benefits. However, the legislature expressly included this ban in the unemployment insurance act, Mass. G. L. Ch. 151A, § 25. If any conclusion is to be drawn from the complete absence of such a provision in the welfare statutes, it would be that the legislature did not intend to apply any such ban to welfare payments.

Plaintiff has presented evidence to show that it is suffering substantial and irreparable damage from a continuance of the strike. Assuming it is suffering such damage, there is no evidence to show to what extent the receipt of welfare payments will affect the continuance of the strike. It is thus uncertain to what extent or how soon the granting of a temporary restraining order will avert further harm to plaintiff. On the other hand the granting of the order will harm the defendant and the state by interfering with their public interest in providing needed relief for the destitute. Moreover, it will inflict serious harm on the needy applicants and their families. Welfare recipients should not be denied the benefits of the welfare system until a determination after full hearing that they are not entitled to them. *Goldberg* v. *Kelly,* 397 U. S. 254.

The motion for a temporary restraining order is denied.

APPENDIX D.

United States Constitution.

ARTICLE VI.

Clause 2. Supreme Law of Land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX E.

Massachusetts General Assistance Statute.

Chapter 117.

Support by the Commonwealth.

§ 1. Commonwealth to Support Poor; What Aid To Be Furnished.

The commonwealth, acting by and through the department of public welfare, shall relieve and support all poor and indigent persons residing or found therein, whenever they stand in need of relief or support. The aid furnished shall include financial, social and medical assistance or aid as indicated by the circumstances and shall be sufficient to enable parents to bring up their children properly and to maintain an adequate standard of living for persons or families or children and shall be in an amount to be de-

termined in accordance with budgetary standards of the department and shall be granted from the date of application therefor.

§ 1B. Certain Male Applicants for Assistance To Be Registered at Local Employment Office, etc.

If the applicant is a male between the ages of eighteen and sixty-two years, the department shall require that said applicant submit, with his application for aid or assistance, evidence from the division of employment security that said applicant has registered for work at a local employment office of the division.

No person shall be eligible for aid or assistance under this chapter who willfully fails without good cause, as determined by the department, to maintain his registration for work as provided in the first paragraph of this section or to accept a referral to or offer of suitable employment. He shall be required to report to the department information with respect to any job to which he has been referred. The department shall, not less frequently than once every three months, request verification from the division of employment security of an applicant's record with that agency.

This section shall not prevent the department, in its discretion, from giving prompt and suitable temporary aid pending compliance with the requirements of this section. No individual shall be considered ineligible for aid or assistance because of failure to comply with the provisions of this section, if such failure is due to illness or disability. In no event shall such failure affect the eligibility of minor children for assistance under this chapter.

No recipient of assistance under chapter one hundred and eighteen A or one hundred and eighteen D, or female recipients of assistance with dependent children under high school age, shall be subject to the provisions of this section.

Massachusetts Aid to Families With Dependent Children Statute.

CHAPTER 118.

Aid to Families With Dependent Children.

§ 1. Definitions.

The followig words and phrases as used in this chapter, unless the context otherwise requires, shall have the following meanings:—

"Dependent child", a needy child who has been deprived of parental support or care by reason of the death, continued absence from the home, physical or mental incapacity or the unemployment of a parent, and who is living with his father, mother or other parent in a place of residence maintained by one or more of such relatives as his or their own home and who is under the age of eighteen or under the age of twenty-one and a student regularly attending a school, college or university or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

"Parent", shall include, in addition to the father and mother of the dependent child, the following:—stepfather, stepmother, stepbrother, stepsister; and blood relative, including those of the half blood, except cousins who are more distantly related than first cousins; adoptive relative of equal propinquity to the foregoing; and spouses of any such persons.

"Aid to families with dependent children", money payments with respect to families with a dependent child or children.

"Department", the department of public welfare.

§ 2. Department of Public Welfare to Furnish Aid to Parents With Dependent Children.

The department shall aid a parent in properly bringing up, in his or her own home, each dependent child but no aid shall be granted under this chapter for or on account of any child unless such child resides in the commonwealth. The aid furnished shall be sufficient to enable such parent to bring up such child or children properly in his or her own home, and shall be in amount to be determined in accordance with budgetary standards of the department, and shall be granted from the date of application therefor. Such assistance shall be paid by cash or in check and shall be paid semimonthly in advance unless the applicant prefers less frequent payments. The amount of such assistance shall not be reduced by the amount of any payment for support due from an absent parent through a court order or otherwise, but said payment from the absent parent shall be made to the department in accordance with section twenty-seven of chapter thirty.

* * * * *

Social Security of 1935, as Amended—Title 42.

§ 602. State Plans for Aid and Services to Needy Families With Children; Contents; Approval by Secretary.

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting an

opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness; (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency; and (6) provide that the State agency will make such reports, in such form and containing such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports; (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b) (2) and (3) of this title); and

(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child, and (ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;

except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of—

(C) any one of the persons specified in clause (ii) of subparagraph (A) if such person—

(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or

(ii) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; or

(D) any of such persons specified in clause (ii) of subparagraph (A) if with respect to such month the income of the persons so specified (within the meaning of clause (7)) was in excess of their need as determined by the State agency pursuant to clause (7) (without regard to clause (8)), unless, for any one of the four months preceding such month, the needs of such persons were met by the furnishing of aid under the plan;

* * * * *

§ 606. Definitions.

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to

provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e) (1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period,

in the case of a needy child under the age 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a) (1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary; but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

§ 607. Dependent Children of Unemployed Fathers; Definition.

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a) (2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with

standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title—

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d) (1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d) (3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be referred to the Secretary of Labor as provided in section 602(a) (19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b) (1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b) (2) of this section), under the program therein specified to refer such father to the Secretary of Labor pursuant to section 602(a) (19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar quarter in which such individual received earned income of not less than $50

(or which is a "quarter of coverage" as defined in section 413(a) (2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

National Labor Relations Act.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

Supreme Court, U.S.
FILED
APR 8 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1467

ITT LAMP DIVISION OF THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
PETITIONER,

v.

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the court of appeals (Pet. A1) is reported at 435 F.2d 989. The opinion of the district court (Pet. A12) is reported at 318 F.Supp. 364.

Jurisdiction

The judgment of the court of appeals was entered on December 14, 1970. The petition for writ of certiorari was filed on March 15, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether the court of appeals, in affirming the district court's interlocutory order denying injunctive relief to petitioner, erred in ruling that petitioner had not demonstrated sufficient probability of prevailing on the merits, i.e., that a significant frustration of federal collective bargaining policy was effected by the granting of welfare benefits to indigent strikers by the Commonwealth or that, even so, the state interest was so insubstantial compared to the federal interest that Congress must be supposed to have preempted the state from serving that interest.

Constitutional Provision Involved

Article VI of the United States Constitution is set forth in the Petition at A15.

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 141 et seq.), the Social Security Act of 1935, 49 Stat. 620, as amended (42 U.S.C. §§ 301-1394), and the Massachusetts General Welfare and Aid to Families with Dependent Children Acts (Mass. G.L. c. 117 and 118) are set forth in the Petition at A15-A28.

Statement of the Case

On August 24, 1970, petitioner's plant at Lynn, Massachusetts, which employed approximately 825 employees,

was struck by 660 employees represented by Truck Drivers, Chauffeurs, Helpers Local No. 42, after several months of unsuccessful negotiations respecting an initial collective bargaining agreement. Thereafter, approximately 175 striking employees applied for welfare benefits under the Massachusetts General Welfare and Aid to Families with Dependent Children Acts. Mass. G.L. c. 117, 118.

The petitioner brought suit in the district court, seeking temporary and permanent injunctive relief to enjoin the payment of any welfare benefits to its striking employees and their families. Petitioner's motion for a temporary restraining order was denied by the district court, and the court of appeals affirmed, although the court noted that the strike against petitioner had subsequently been settled.

Argument

First of all, since the strike against petitioner has been settled (Pet. A2), no actual matters in controversy essential to the decision of the case are before this Court. Accordingly, this case falls within the long-established rule that this Court does not sit to give opinions upon moot questions or abstract propositions. *Oil Workers Unions* v. *Missouri,* 361 U.S. 363, 367. *Bus Employees* v. *Wisconsin Board,* 340 U.S. 416, 418. Similarly, the petition ignores a corollary rule that the Court will not pass upon an issue where the case has not been fully tried, unless the ruling is "fundamental to the further conduct of the case." *Gillespie* v. *U. S. Steel Corp.,* 379 U.S. 148, 153-154. This rule particularly applies to a petition for writ of certiorari seeking to review a decree of a circuit court of appeals on appeal from an interlocutory order, *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.,* 148 U.S. 372, 384, which includes of course the denial of a preliminary injunction.[1]

[1] The denial of the motion for a temporary restraining order was considered by the court of appeals to have the effect of a denial of an injunction (Pet. A2, fn. 2).

Myers v. *Bethlehem Shipbuilding Corporation,* 303 U.S. 41, 52. In short, the petition requests this Court to make an unnecessary ruling upon an interlocutory order in a case now clearly moot.

Secondly, since the Court decides questions of public importance only in the context of meaningful litigation, the resolution of an issue posed in a petition should be deferred where the decision below can be sustained on an independent or alternative ground. See *The Monrosa* v. *Carbon Black, Inc.,* 359 U.S. 180, 184. In the court of appeals, the petitioner was under the heavy burden of showing a clear error of law or abuse of discretion by the district court in its refusal to find that injunctive relief was justified. *Automatic Radio Mfg. Co.* v. *Ford Motor Co.,* 390 F.2d 113, 115-116 (1st Cir. 1968), *cert. denied,* 391 U.S. 914. Since the award of an interlocutory injunction is not a matter of right but of sound judicial discretion, the district court was obliged to balance the conveniences and possible injuries to the parties. *Yakus* v. *United States,* 321 U.S. 414, 440. On the one hand, the district court found that there was no evidence to show to what extent the receipt of welfare benefits would affect the continuance of the strike. (Pet. A14). The court of appeals reached the same conclusion. (Pet. A3, fn. 3). On the other hand, the district court found that the granting of the order would harm the respondent and the state by interfering with the public interest in providing needy relief for the destitute, and would inflict serious harm on needy applicants and their families. (Pet. A14). The "state's legitimate interests" were also recognized by the court of appeals. (Pet. A7). Under these circumstances, it lay well within the district court's discretion to withhold relief which would adversely affect a pulbic interest until a final determination of the rights of the parties. *Ibid.* Since there is no clear showing of an improvident exercise of judicial discretion, the judg-

ment below must stand on this ground. See *Myers* v. *Bethlehem Shipbuilding Corporation, supra* at 52.

Lastly, the petition presents no substantial question warranting further review by this Court. There is no conflict between circuits, as petitioner implicitly admits (Pet. 4), and the decision below—which is based on a careful analysis of the facts and the questions of law presented—is correct. The issue whether such welfare assistance was federally preempted by the National Labor Relations Act did not even arguably fall within the preemption zone delineated by *San Diego Building Trades* v. *Garmon*, 359 U.S. 236, its ancestors and progeny, since those decisions were concerned with the specific subject matter of sections 7 and 8 of the Act (the protection of concerted activities and the proscription of unfair labor practices, both under NLRB jurisdiction), plainly inapplicable here (Pet. A5). Accordingly, petitioner's citation of *dicta* from these authorities is inapposite. Since the asserted conflict involved only a "tangential frustration" of unfettered collective bargaining, the court of appeals properly undertook a balancing process, assessing the degree of conflict and relative importance of state and federal interests, noting that in the absence of a clear manifestation by Congress, the exercise of a state's historic police powers could not be invalidated under the Supremacy Clause in the absence of persuasive reasons, or unless the administration of state law palpably infringed upon federal policy (Pet. A5-A6). After such a detailed assessment (Pet. A6-A8),[2] the court of appeals reached the only possible conclusion—substantial doubt that a significant frustration of federal collective bargaining policy was effected by the granting of welfare benefits to indigent strikers, wholly apart from the inadequacy of the evidence before the district court (Pet. A8.)

[2] The court of appeals indicated that the appropriate forum for resolving this issue was Congress (Pet. A8).

The petition also ignores a second and independent ground for the decision below—substantial doubt that the state interest was so insubstantial compared to the federal interest that Congress must be supposed to have deprived the state of such power to serve that interest (Pet. A8). Clearly, the state's interests "in minimizing hardship to families of strikers who have no other resources than the weekly pay check, its concern in avoiding conditions that could lead to violence, [and] its interest in forestalling economic stagnation in local communities" (Pet. A7), *inter alia,* must weight heavily in the balance. Even under *Garmon,* a state can act where there exists a deeply rooted local responsibility, *id.* at 243-244, or an overriding state interest. *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 61. In view of the vital interests of the applicants (see *Goldberg* v. *Kelly,* 397 U.S. 254, 264), the court of appeals was not bound to accept petitioner's argument below that it had a right to starve striking employees and their families pending a hearing on the merits.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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April, 1971

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1467

ITT LAMP DIVISION OF THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Petitioner

VS.

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
Respondent.

BRIEF OF THE STATE OF IOWA AS AMICUS CURIAE ON BEHALF OF PETITIONER FOR WRIT OF CERTORARI

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THE ATTORNEY GENERAL OF UTAH, VERNON B. ROMNEY, AND THE ATTORNEY GENERAL OF ARKANSAS, RAY THORNTON, JOIN IN IOWA'S BRIEF.

INTEREST OF THE STATE OF IOWA

A recent official opinion of the Attorney General of Iowa in construing the specific language of the Iowa statutes on general relief, soldier's relief and ADC held that while the children of strikers were entitled to ADC, the statutes did not provide welfare to the strikers.[1]

The interpretation of the Massachusetts general relief and ADC statutes by administrative regulation were differently interpreted.

[1] AGO 2/16/71 Appendix A

It appears that in addition to the construction of specific statutory language, there is an underlying fundamental legal proposition common to all welfare statutes, which would save a circuity of actions in Iowa and other states with similar problems, if the question raised in this case were determined by this court at this point in time.

THE ISSUES

A. Does Federal law prohibit states from granting welfare to employees while on strike either by administrative regulations or legislative enactments?

B. Did Congress intend to extend welfare grants to employees on strike pursuant to the Social Security Act which provides aid to dependent children?

BRIEF POINT I

THE UNITED STATES CONSTITUTION, ARTICLE VI, THE NATIONAL LABOR RELATIONS ACT, AND JUDICIAL DECISIONS OF THIS COURT INDICATE THAT STATES ARE PROHIBITED BY ADMINISTRATIVE REGULATIONS OR LEGISLATIVE ENACTMENTS FROM USING PUBLIC FUNDS TO INTERFERE WITH FREE BARGAINING RIGHTS.

Comment

The Congressional declaration of purpose and policy of the "Labor Management Relations Act, 1947" is stated as:

"(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

> "It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activites affect commerce, to define and proscribe (sic) practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."[2]

Of this Act, a contemporary commentator of the law has said:

> "The heart of the national labor policy is the private adjustment of conflicts of interest over wages, hours, and other conditions of employment, by the negotiation and administration of collective bargaining agreements between employers and the union designated as their representatives by a majority of the employees in appropriate bargaining units."[3]

In the field of labor relations, this court has always recognized that there is Federal supremacy over the states and that states may not enact any legislation which infringes upon the free collective bargaining rights guaranteed to the parties by the Federal Labor Relations Act. Except to prevent violence under the traditional power of the state to maintain the peace, the court has struck down state laws enacted without Congressional authority, which were inconsistent with the concept of Federal supremacy as fashioned by the Federal laws, policies and the courts.[4]

---

[2]Title 29 U.S.C. Section 141.

[3]Cox, "Federalism in the Law of Labor Relations" (1954), '67 Harvard Law Review, 1297, 1318

[4]Table of Citations, P. ii Petition for Writ and p. A4 of opinion re: Violence

Congress, in the National Labor Relations Act, has specifically provided that states may pass laws in certain specific areas.[5] But, in the Act, it has never carved out an exception which would permit a state to interfere with the right of both the employer and the employee to bargain freely in their negotiations by financial participation in the form of public welfare funds to voluntary economic strikers.

When Massachusetts so interprets its state statutes to permit state interference, it not only is outside the expressed scope and purpose of the National Labor Relations Act, but it violates the very principles of free bargaining guaranteed to both the employer and employee.

It takes little imagination to realize that substituting welfare benefits for wages has the effect of interfering with the free bargaining rights between employees and employers.

BRIEF POINT II

CONGRESS DID NOT DESIGN THE SOCIAL SECURITY ACT TO PROVIDE ADC BENEFITS TO AN ADULT BREADWINNER WHO VOLUNTARILY LEAVES HIS EMPLOYMENT TO PARTICIPATE IN A STRIKE.

Comment

The thrust of the amendments in 1967 to the Social Security Act was to encourage those persons legally liable for the support of children to enter the labor force.[6] Each state plan was thereafter required to:

> "(15) provide -- (A) for the development of a program for each appropriate relative and dependent

---

[5]Title 29 U.S.C. Section 164 (b)

[6]Title 42 U.S.C. Section 602 (a) (15) (A) (i)

> child receiving aid under the plan, and each appropriate individual (living in the same home as a relative and child receiving such aid) whose needs are taken into account in making the determination under clause (7), with the objective of -- (i) assuring, to the maximum extent possible, that such relative, child, and individual will enter the labor force and accept employment so that they will become self-sufficient, . . . "

Under this amendment, the Secretary of HEW did not construe striking as an acceptable reason to refuse a bona fide offer of employment when writing regulations under Title 42, Section 607 "Dependent Children of Unemployed Fathers". In Regulation 233.100.[7] , only three factors were enumerated: (1) minimum wages, (2) physical ability to do the work, and (3) unsafe working conditions, including lack of workman's compensation protection.

Under the doctrine of statutory construction, the Latin phrase "expressio unius est exclusio alterius", participation in a labor strike is not sufficient reason to refuse a bona fide offer of employment and thus be qualified for AFDC benefits.

According to the Legislative History of the 1967 Amendments to the Social Security Act, the purpose was

> " . . . providing greater incentives for appropriate members of families drawing aid to families with dependent children (AFDC) payments to obtain employment so that they need no longer be dependent on the welfare rolls."[8]

This interpretation has also been passed upon in effect by this Court when in King v. Smith[9] AFDC benefits are reserved for needy children who have no breadwinner legally obligated to support them.

---

[7] Appendix B Regulation Section 233.100 Title 45, Code of Federal Regulations, Chapter II, Section 233.100

[8] Appendix C, Legislative History of the 1967 Amendment to the Social Security Act, Pub. Law 90-248, 1967 U.S. Code Cong. and Adm. News, pp. 2834 and 2835

[9] King v. Smith
392 U.S. 309, 20 L.Ed 1118 at 1131 and 1132, 88 S.Ct. 2128

At page 1131, we read:

> "The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. . . . This group was composed of children in families without a 'breadwinner', 'wage earner', . . . "

And at page 1132, we read:

> "It is clear, as we have noted that Congress expected 'breadwinners' who secure employment would support their children . . . "

At page 567, this Court in Lewis v. Martin [10] (April 20, 1970) commented that the Congressional intent of the basic purpose of the Act was "providing aid to 'needy' children, except where there is a 'breadwinner' in the house who can be expected to provide such aid himself."

Had Congress intended that welfare should be granted to persons on strike from their employment, it would have so stated as it did in the amendment to the Food Stamp Act of 1964. [11]

In that amendment, Congress specifically provided that

> "refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment",

Thus an "able-bodied adult person between the ages of eighteen and sixty-five", who goes on strike, may receive food stamps in that Federally-funded program, if otherwise eligible.

---

[10] Lewis v. Martin
397 U.S. 552, 25 L.Ed2d 561, at 567, 90 S.Ct. 1282

[11] Pub. Law 91-671, 91st Congress, HR 18582, January 11, 1971

CONCLUSION

The Federal labor laws protect employees and employers in their bargaining relations in the economic area.

The other Act (as well as local general relief laws) protects the rights of the needy persons, who, due to no fault of their own, are unable to be self-supporting by their own labors.

The 1967 amendments tc the Social Security Act is to encourage persons to become "breadwinners" not "welfare recipients". It is designed to provide support for needy children who have no "breadwinner", as stated by this court in King v. Smith. It has never been interpreted by this court as designed for those who have a "breadwinner" legally liable for the support of minor children, but who voluntarily leaves employment in an economic strike.

The level of subsistence of these needy children could suffer a sharp cutback during periods of strikes if this were the interpretation.

If Congress intended for this to happen, it would have so stated in explicit terms. Certainly it spoke explicitly in the amendment to the 1964 Food Stamp Act in providing food stamps to strikers.

We suggest that the legal questions in this cause are of such nation-wide concern to our economy and to the welfare of our needy unemployable persons that this court should give its attention to the problem.

Respectfully submitted,

RICHARD C. TURNER
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State of Iowa

LORNA LAWHEAD WILLIAMS
Special Assistant Attorney
General of Iowa
Attorneys for State of
Iowa Amicus Curiae

APPENDIX A

WELFARE: Limitations on Public Assistance to Strikers —§§ 234.11, 239.3, 249C.6 and Ch. 252, Code of Iowa, 1971. Food stamps available, if otherwise eligible, pursuant to Federal Food Stamp Act; Iowa recognizes the food stamp program in § 234.11; no ADC available under §239.3, if neither parent is incapacitated and both live in home; the single parent not entitled to assistance under § 249C.6, but possible personal allowances available to child; a veteran on strike is not entitled to Soldiers Relief for the "indigent" under § 250.1; a person on strike is not a "poor person" under Ch. 252, pertaining to general county relief. (Williams to Chalupa, Jasper County Attorney, 2/16/71) #71-2-40

February 16, 1971

Dennis F. Chalupa, Esquire
Jasper County Attorney
301 Jasper County Courthouse
Newton, Iowa 50208

Dear Mr. Chalupa:

You have requested an Opinion of the Attorney General as to:

> "Whether or not persons would be eligible, depending on their particular circumstances, for food stamps, aid to dependent children, soldier's relief or general relief, if they have no wages due to the fact that they are on strike and receive only strike pay from their union."

DIVISION I—FOOD STAMPS

The Food Stamp Act of 1964 (P. L. 88-525, 78 Stat. 703), authorizes the U. S. Secretary of Agriculture to formulate and administer a Food Stamp Program for the purpose of encouraging the increased utilization of the nation's abundance of food by raising levels of nutrition among low-income households. (Regulations were published December 30, 1970 in Vol. 35, Federal Register No. 252.) The Food Stamp Program is financed solely by the Federal Government with no state or local funds involved, and, although administered by the Iowa Department of Social Services and County Welfare Boards, it is regulated by the Federal Government. Iowa has recognized the program (§ 234.11, Code of Iowa, 1971), but has enacted no laws regulating it.

Pursuant to the above-cited federal regulations, the Iowa Department of Social Services establishes the income and resource eligibility limitations with approval of the U. S. Secretary of Agriculture. Persons, whether on strike or not, having income or resources in excess of these standards, are not eligible to receive food stamps; and when they apply or reapply for food stamps, the income which they received for the 30-day period prior to their application or reapplication is considered in making the determination for eligibility, including wages or striker's pay.

However, persons who meet the income and resources eligibility requirements and are on strike, may be certified to participate in the federal food stamp program.

DIVISION II—ADC ASSISTANCE

This program is designed to aid families with needy children where there is only one parent in the home or where there is an incapacitated father under the Federal

Social Security Act, Title 42 U. S. C., 602-644 and Chapter 239, 1971 Code of Iowa. Section 239.3, 1971 Code of Iowa defines a "dependent child" as:

> ". . . a needy child under the age of 16 or under the age of 21 and a student . . . who has been deprived of parental support and care by reason of death, continued absence from home, physical or mental incapacity, or unfitness of either parent . . ."

Therefore, if the child is living in the home where both the mother and father are residing, unless one is incapacitated, he is not eligible to receive ADC.

In the case of a single parent who is participating in a strike, that parent is disqualified from having access to and ADC funds. Section 249C.6, 1971 Code of Iowa, reads as follows:

> "Participation required. Each eligible person shall . . . accept any reasonably suitable employment . . . as a condition of receiving public assistance. If he fails or refuses to do so, he shall not receive public assistance. His disqualification shall not disqualify other members of his family who are entitled to public assistance, but their public assistance shall not be paid to the disqualified person and shall be paid in a manner which will not permit the disqualified person to have access to the assistance fund."

A person who goes on strike cannot be deemed to be cooperating or accepting reasonably suitable employment, and thus becomes ineligible to receive ADC payments. The portion of ADC payments which are paid solely for the children in the ordinary case where the parent is eligible must be paid to a guardian, duly appointed as provided by § 239.5, Code of Iowa, 1971.

DIVISION III—SOLDIERS RELIEF

The funds for Soldiers Relief are derived from county tax levies pursuant to Chapter 250, 1971 Code of Iowa, and this relief is jointly granted by the Board of Supervisors and the Soldiers Relief Commission for the purposes stated therein. Section 1, Chapter 250 provides that the fund shall be used:

> ". . . for the relief of and to pay the funeral expenses of honorably discharged, indigent men and women of the United States who served in the military or naval forces."

The word "indigent" as used in this chapter has been defined in two Attorney General's Opinions as follows:

1932 OAG, at page 164, reads in part:

> ". . . the term 'indigent' is used to refer to one's financial ability and ordinarily indicates one who is destitute of means of comfortable subsistence so as to be in want."

OAG 1919-1920 at page 702 reads in part:

> ". . . a person is indigent when they are not possessed of sufficient funds to comfortably provide for themselves . . .
>
> "Public funds should not be expended in assisting those who are able to care for themselves."

A person who could work at his job, but goes on strike, cannot be deemed indigent or expect the public to support him and his strike.

DIVISION IV—GENERAL RELIEF

General County Relief is granted pursuant to the provisions of Chapter 252, 1971 Code of Iowa, to persons defined as "poor". Section 252.1 defines a "poor person" as follows:

> "those who are unable because of physical or mental disability to earn a living by labor."

Persons on strike are not necessarily "poor", and they are not on strike because of physical or mental disability which prevents them from earning a living, but rather because they seek a better living. County General Relief is restricted to those who are unable, because of a physical or mental disability, to earn a living.

Respectfully submitted,

/s/ LORNA L. WILLIAMS,
Lorna L. Williams,
Special Assistant Attorney General

LLW:e

APPENDIX B

Excerpts from Title 45, Code of Federal Regulations Chapter II Section 233.100 (p. 571):

"Section 233.100 Dependent children of unemployed fathers.

"(a) Requirements for State Plans. If a State wishes to provide AFDC for children of unemployed fathers, the State plan . . . must . . .

"(3) Provide for payment of aid . . . when the conditions set forth in subdivisions (ii) are met . . .

"(ii) Such father has not without good cause, . . . refused a bona fide offer of employment . . . "

Questions with respect to the following factors must be resolved:

"(a) That there was a definite offer of employment at wages meeting any applicable minimum wage requirements and which are customary for such work in the community;

"(b) Any questions as to the father's inability to engage in such employment for physical reasons or because he has no way to get to or from the particular job; and

"(c) Any questions of working conditions, such as risks to health, safety, or lack of workman's compensation protection."

APPENDIX C

LEGISLATIVE HISTORY OF THE 1967 Amendments to the Social Security Act.

Excerpts from 1967 US Code Cong. and Adm. News.

(A) On pages 2834 and 2835, we read:

> " . . . providing greater incentives for appropriate members of families drawing aid to families with dependent children (AFDC) payments to obtain employment so that they need no longer be dependent on the welfare rolls."

(B) On page 2837 we read:

> " . . . (1) For the purpose of providing greater incentives for appropriate members of families drawing aid to families with dependent children (AFDC) payments to obtain employment so that they need no longer be dependent on the welfare rolls the bill would -- . . . "

(C) On page 2860 we read:

> "An important facet of this suggested work program is that in most instances the recipient would no longer receive a check from the welfare agency. Instead, he would receive a payment from an employer for services performed. The entire check would be subject to income, social security, and unemployment compensation taxes, thus assuring that the individual would be accruing rights and responsibilities as he would in regular employment . . . "
>
> "A refusal to accept work or undertake training without good cause by a person who has been referred would be reported back to the State agency by the Labor Department; and, unless such person returns to the program within 60 days (during which he would receive counseling), his welfare payment would be terminated. Protective and vendor payments would be provided to protect dependent children from the faults of others . . . "

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

RESPONSE TO BRIEF FOR THE RESPONDENT IN OPPOSITION.

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ARGUMENT.

I. THE DOCTRINE OF MOOTNESS IS NOT APPLICABLE TO THE PRESENT CASE.

Respondent argues that this Court should deny the Petition on the ground that since the strike against Petitioner is settled, the issue of whether a State can provide welfare assistance to strikers is moot. This contention was raised and rejected in the proceedings before the First Circuit.

The First Circuit held that the issue presented falls under "the 'recurring question' category, where significant public rights are involved and court review ought not, if possible be avoided." (Pet. Br. A, A2.)

This Court has also rejected the application of the mootness doctrine in cases where significant public rights are involved and the question is of a recurring nature. In *Southern Pacific Terminal Company* v. *ICC,* 219 U. S. 498 (1911), relied on by the First Circuit, the Appellant sought review of a short term order of the Interstate Commerce Commission which had expired pending review. The Commission, like Respondent, defended on the ground that the case had become moot. This Court held that the doctrine of mootness did not apply to cases where public rights and interests are involved and where the action complained of is of a recurring nature.

In *Moore* v. *Ogilvie,* 394 U. S. 814 (1969), the Appellant challenged the validity of a statute whose provisions deprived the Appellant of an opportunity to run for elective office. Even though the election had taken place this Court refused to apply the doctrine of mootness since the issue was "capable of repetition, yet evading review." *Moore* v. *Ogilvie,* 394 U. S., *supra* at 816.

As in *Southern Pacific* and *Moore,* the issue in the instant case, as the First Circuit recognized, is one of a recurring nature and is inherently evasive of judicial review. The course of conduct which Petitioner seeks to enjoin continues to be implemented and therefore is no less an impediment to free collective bargaining at the present time than it was when this case was commenced. Rather than denying review of an issue involving "significant public rights" (Pet. Br. A, A2), the First Circuit recognized the continued importance of this question regardless of the fact that the strike against Petitioner was settled.

Further evidence that the doctrine of mootness is not applicable is found in the recent opinion of the Eighth Circuit in *Solien* v. *Teamsters Local 610, et al.*, ... F. 2d ..... (8th Cir. 1971), 76 LRRM 2780. In *Solien,* the Court was faced with the question of whether the party filing secondary boycott charges is entitled to the status of a party litigant in a temporary injunction proceeding in District Court. The Union contended that the case was moot since it had reached agreement with the trucking company with whom it had a dispute and also had ceased picketing the neutral employer. In rejecting the mootness argument, the Eighth Circuit, relying on this Court's decisions in *Southern Pacific* and *Moore,* and the First Circuit's opinion in the instant case, stated (2782-3):[1]

> "We are impressed with the argument of appellants that the alleged errors committed in the § 10(l) proceedings are inherently evasive of review since it is not feasible to perfect and obtain an appellate review prior to the Board's 'final adjudication.' Consequently, since we believe that the doctrine of mootness should not be used to perpetually frustrate judicial review of issues of public importance arising in otherwise justifiable cases, the following comments are appropriate:
>
> > 'If the Court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness. This policy overrides the first policy of ensuring the effective functioning of the adversary system, so demonstration of the litigants' personal stake should not be required. The Court must acknowledge that the real choice is not between taking or not taking risks with the quality of the judicial

1. In a case almost identical to *Solien,* the Third Circuit held that the settlement of a strike and the cessation of picketing caused the issue to be moot. *Samoff* v. *IAM, District Lodge No. 1,* 420 F. 2d 952 (3rd Cir. 1969). The Eighth Circuit rejected the Third Circuit's application of the mootness doctrine in *Solien.*

> process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity.' 83 Harv. L. Rev. at 1692 (footnote omitted).
>
> "We conclude that these appeals are not moot: furthermore, the policy of ensuring judicial review of issues of public importance which are inherently evasive of review compels us not to refuse review on the basis of mootness. *See ITT Lamp Division of the Int'l Telephone & Telegraph Corp.* v. *Minter*, ... F. 2d ..... (1st Cir. Nos. 7720 and 7749, Dec. 4, 1970).

If it were necessary for a strike to continue in order to secure review of the issue presented, it is likely that all cases would be moot by the time they reached this Court. In the instant case, the Petitioner acted in the most expeditious manner to secure judicial review and yet it would have had to endure almost an eight-month strike to avoid the Respondent's contention of mootness. Moreover, this Court has recognized that it "should be astute to avoid hindrances in the way of taking" cases which involve questions of State interference with federal labor policy. *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306-308 (1964).

Similarly, the argument of Respondent that this case is not presented in the context of meaningful litigation must be rejected. The decision of the District Court was taken after a full presentation by both parties and the Court's decision reflects its determination that the payment of welfare benefits does not conflict with the right of an employer to engage in free collective bargaining (App. A, A13). Likewise, the First Circuit rejected the argument that the payment of welfare benefits to strikers constituted an interference with the right to engage in free collective bargaining (App. A, A6-8). Both decisions fully considered and ruled on the issue now presented to this Court and it cannot be argued that the issue was not presented in the context of meaningful litigation.

II. THIS COURT SHOULD GRANT THE PETITION OF CERTIORARI SINCE THE ISSUE RAISED IS ONE OF PUBLIC IMPORTANCE INSOFAR AS THE ADMINISTRATION OF FEDERAL LABOR POLICY IS CONCERNED.

The importance of having this Court review the issue of whether the payment of welfare benefits to strikers conflicts with the established right of free collective bargaining is illustrated by the conflict generated among the states regarding the administration of federal and state welfare statutes toward strikers. The opinion of the First Circuit, upholding the position of the Massachusetts Attorney General, is in direct conflict with the position taken by the Attorney General of Iowa that welfare benefits should not be made available to strikers.[2] Thus, an employee on strike in Massachusetts would receive welfare while an employee on strike in Iowa would be denied these benefits even though the same employer might be involved. It is important that this Court resolve the question of whether strikers can, consistent with the right of free collective bargaining, receive welfare. To deny review will create further uncertainty in this area and hamper the administration of state and federal welfare statutes, as well as the implementation of the national labor policy of free collective bargaining.

The national importance of the question presented in this case is illustrated by the brief *amicus curiae* filed by the United States Chamber of Commerce. The Chamber of Commerce brief shows the pervasiveness of the problem of welfare assistance to strikers and the significant impact public assistance has had on collective bargaining throughout the country.

Recently this Court has held that the national labor

2. The Attorney General of Iowa has filed a brief *amicus curiae* in support of the Petition (A1-5).

policy should no longer emphasize "the protection of the nascent labor movement", but rather "the encouragement of collective bargaining and administrative techniques for the peaceful resolution of industrial disputes." *Boys Market, Inc.* v. *Retail Clerks Union, Local No. 770,* 398 U. S. 235, 257 (1970). But the payment of welfare assistance to strikers "rewards a man for walking off his job" and increases the "probability of a strike being long and its settlement costly."[3] In rewarding those striking, and in fact encouraging longer strikes, these welfare payments undermine the principal thrust of *Boys Market* which is to limit labor strife, rather than to promote it.

Welfare payments to strikers not only induces strikes, but, as has been shown, has the corollary impact of hindering free collective bargaining. Surely, in a system founded on these two notions, the promotion of both industrial peace and free collective bargaining, such payments have no place. *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 45 (1937); Wellington, *Freedom of Contract and the Collective Bargaining Agreement,* 112 U. Pa. L. Rev. 467 (1964).

Lastly, Respondent overlooks the fact that the striking employees (which Respondent claims Petitioner is attempting "to starve" (Resp. Br. p. 6)) are individuals who voluntarily chose to refrain from working. This case does not concern individuals who were involuntarily unemployed. Conversely, this case concerns individuals who temporarily abandoned their jobs for the purpose of securing their Union's goals at the bargaining table and as this Court has recognized "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *NLRB,* 380 U. S. 300, 309 (1965).

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3. Thiebolt and Cowin, *Food Stamps and Strikes: The Nature of the Problem,* Industrial Research Unit, University of Pennsylvania's Wharton School of Finance and Commerce (February, 1971).

CONCLUSION.

For the reasons set forth in the Petition and in this Brief in Response, Petitioner submits that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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R. THEODORE CLARK, JR.,
ANDREW M. KRAMER,
Attorneys for Petitioner.

April, 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1467

ITT LAMP DIVISION OF THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Petitioner.

vs.

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
Respondent.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

and

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America (hereinafter called the "Chamber") moves for leave to file the attached brief *amicus curiae* in support of the petition for writ of certiorari. The consent of petitioner was obtained, but consent was refused by respondent.

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000, and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The issue involved in this case—whether the State may subsidize one side in a labor dispute and thus radically rebalance the economic power of the adversaries—is of fundamental importance to our national labor policy. Free collective bargaining implies the right "of an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." *H. K. Porter Company, Inc.* v. *N. L. R. B.*, 397 U. S. 99, 109 (1970). Either party may resort to "the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other." *N. L. R. B.* v. *Insurance Agents' International Union*, 361 U. S. 477, 489 (1960). Collective bargaining, under the federal scheme, contemplates a "brute contest of economic power" with "negotiating positions . . . weak or strong in accordance with the degree of economic power the parties possess." *Ibid.* There is a choice constantly available to the adversaries: accept the position of the other side or, if mutual agreement cannot be obtained and economic warfare occurs, bear the full economic deprivations of the ensuing conflict.

The decision below, by disregarding these basic principles, causes a severe dislocation in the process of free collective bargaining. It permits a union to voluntarily choose to strike to obtain its demands, and confront an employer with all of the financial burdens imposed by a strike, without any correlative economic disadvantage to its membership. A union's decision to engage in economic warfare will no longer be dictated by its own relative economic power; instead, the Government will be its ally in alleviating any hardship it may have to incur. Such a State-sanctioned alteration of bargaining power is, the Chamber believes, dangerously wrong and warrants review by this Court.

The preservation of free collective bargaining from un-

warranted Government intrusion is a matter of vital continuing concern to the Chamber. For example, the Chamber recently appeared, as *amicus curiae,* in successfully convincing this Court that the National Labor Relations Board could not undermine this fundamental principle by ordering agreement to a substantive term of a collective bargaining agreement (*H. K. Porter Company, Inc.* v. *N. L. R. B., supra*) and that, in order to foster voluntary collective bargaining, equitable relief should be available to compel compliance with agreements freely entered (*Boys Markets, Inc.* v. *Retail Clerks Local 770,* 398 U. S. 235 (1970)). The Chamber has a similar interest in this litigation and believes its views and experience may again be of assistance to the Court.*

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* For these reasons the Chamber sought to participate in this case as an *amicus curiae* while it was pending before the court below. This motion was denied by order of the court entered October 30, 1970.

TABLE OF AUTHORITIES.

PAGE

Cases.

American Ship Building Co. v. N. L. R. B., 380 U. S. 300 (1965) 5

Boys Markets, Inc. v. Retail Clerks Local 770, 398 U. S. 235 (1970) 3

General Electric Co. v. Callahan, 294 F. 2d 60 (1st Cir. 1961) 10

Local 24, International Brotherhood of Teamsters v. Oliver, 358 U. S. 283 (1959) 5

John Hancock Mutual Life Ins. Co. v. Commissioner, 349 Mass. 390 (1965) 10

Nash v. Florida Industrial Commission, 389 U. S. 235 (1967) 10

N. L. R. B. v. Insurance Agents' International Union, 361 U. S. 477 (1936) 4, 5

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937) 10

H. K. Porter Company, Inc. v. N. L. R. B., 397 U. S. 99 (1970) 5

Statutes.

Ia. Code Ann. Vol. 11A, § 239 (1939) 9

New Hamp. Rev. Civ. Stat. Ann. Vol. 2, ch. 167, § 43 (1a42) 9

Tex. Rev. Civ. Stat. Ann. Vol. 1B, Art. 695c, § 17 (1925) 9

Va. Code Ann. Vol. 9, Tit. 63, § 1-105 (1950) 9

Wis. Stat. Ann. Vol. 7, § 49.17 (1950) 9

Miscellaneous.

Berkshire Eagle (Berkshire, Mass.), Dec. 17, 1969.... 6

Compton, "Victory at GE: How It Was Done", The American Federationist, July 1970..... 6

Friendly, No Early Settlement Seen in Britain's Postal Strike, Washington Post, Feb. 19, 1971..... 8

Haggart, Unemployment Compensation During Labor Disputes, 37 Nebr. L. Rev. 668 (1958)..... 9

Iowa Attorney General Opinion, Feb. 16, 1971..... 10

Jones, Copper Strikers Glum After 7 Months but Resolved Not to Quit, N. Y. Times, Feb. 13, 1968..... 7

New York Times, Mar. 17, 1970..... 6, 7

North Adams Transcript, North Adams, Mass., Feb. 4, 1970 6

Seafarers' Log (Seafarers International Union) January 1970 6

Senate Committee on Finance Rep. No. 165, 87th Cong. 1st Sess. (1961) 9

Syracuse Post-Standard, Feb. 16, 1971, p. 6..... 6, 7

Thiebolt and Cowin, Food Stamps and Strikes, Industrial Research Unit, University of Pennsylvania's Wharton School of Finance and Commerce (February 1971) 8

U. S. News & World Report, Oct. 3, 1960..... 7

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Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

This case poses an issue which, perhaps more than any other, will determine whether voluntarism, rather than government compulsion, is at the heart of the American collective bargaining system.

1. Economic force is a "prime motive power for agreements in free collective bargaining." The "availability of economic pressure devices to each [party] to make the other party incline to agree on one's terms" is "part and parcel" of our federal labor scheme. *N. L. R. B.* v. *Insurance Agents' International Union,* 361 U. S. 477, 489, 496 (1960). A strike or lockout may well dissuade a party

from adhering to its bargaining position, "but the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *N. L. R. B.*, 380 U. S. 300, 309 (1965). It is not the function of the State to introduce into the collective bargaining process a "standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons . . . " *Insurance Agents*, 361 U. S. at 497 (footnote omitted). The "results of the contest" must be left "to the bargaining strengths of the parties." *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970).

The decision below, by sanctioning the payment of welfare benefits to strikers, substantially disrupts this scheme and significantly intrudes into an area designed to be free of any government interference. There is no room in a system of voluntary ordering of industrial relations for a state policy which radically restructures the economic power of the disputants, restricts the economic weapons at their disposal and materially affects their substantive solutions to the problems of wages and working conditions. If, as this Court observed in *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, 297 (1959), "there is to be this sort of limitation on the arrangements that unions and employees may make . . . it is for Congress, not the States, to provide it."

2. There is, notwithstanding the doubts expressed by the court below (App. Pet. p. A8), a significant frustration of federal labor policy affected by the grant of welfare benefits to strikers. The availability of welfare payments, particularly when coupled with the unemployment compensation benefits available to strikers in some states, federal food stamp subsidies, and other forms of public assistance, encourages employees to strike, protracts the

duration of strikes and, in general, prevents the voluntary settlement of labor disputes. Unions are permitted to insist on their proposed resolution of contractual terms, and to impose considerable burdens on their employer counterparts in order to secure such terms, largely free from any economic disadvantage to their membership. For example:

> —During the 1969-1970 strike at General Electric Company, public assistance was estimated to total about $5,000,000 nationally *for each week* of that three month strike.[1] In Massachusetts alone, Respondent's Director of Research proclaimed that he paid out $2,307,823 in welfare benefits to strikers and their families.[2] This sum, which exceeded by far the benefits that strikers received from union sources,[3] was understandably viewed as "one of the key contributions to the strike's success".[4] Indeed, in New York State, where unemployment compensation benefits of $65 (now $75) a week were available, even the eventual settlement terms were rejected "while other [Union] groups around the country were voting to go back to work."[5] As the New York Times observed, if such "out-of-state locals with no job insurance cushion" had not "approved [the agreement] overwhelmingly . . . the GE strike might still be dragging on."[6] It is

1. Seafarers' Log (Seafarers International Union), January 1970, p. 3.

2. North Adams Transcript (North Adams, Mass.), Feb. 4, 1970, p. 28, col. 3.

3. Berkshire Eagle (Berkshire, Mass.), Dec. 17, 1969, p. 1, quoting AFL-CIO official Leo Perlis: "More help [to strikers] will probably come—most assuredly come—from community resources than from any source."

4. Compton, "Victory at GE: How It Was Done", *The American Federationist*, July 1970, p. 6.

5. Syracuse Post Standard (Syracuse, N. Y.), Feb. 16, 1971, p. 6.

6. New York Times, Mar. 17, 1970, p. 42, col. 2.

not surprising, therefore, that public assistance benefits were considered "a major factor in prolonging the strike and in the rejection of settlement terms . . .,[7] and that the availability of such a public subsidy was categorized as an "incentive to irresponsibility" and source of "rank-and-file intransigence."[8]

—During the 1960 steel strike, an estimated $45 million in various forms of public assistance was distributed to strikers. I. W. Abel, now president and then secretary-treasurer of the Steelworkers Union, exclaimed that such aid "provided the food, shelter and welfare services that made the strike endurable. The sum exceeded by far the amount that the union poured into the districts and the locals."[9]

—During the 1967-8 copper strike, in one 1500-man local of the striking union, 900 members received strike benefits while 500 others were paid county welfare payments as well as federal food stamps. The "solidarity of the strikers" was thus based, in great part, on the "wide support from a combination of public welfare, federal food stamps and union strike benefits."[10]

—An article on the British postal strike this year, indicating that the strike "appears hopelessly deadlocked . . . [with] no [visible] prospect for an early settlement," commented that "it had been thought that . . . because the union began the strike with a depleted

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7. Syracuse Post-Standard (Syracuse, N. Y.), Feb. 16, 1971, p. 6.

8. New York Times, Mar. 17, 1970, p. 42, col. 2. See also *$75 Weekly Plus Welfare for GM [Strikers]*, Syracuse Post-Standard (Syracuse, N. Y.), Nov. 6, 1970, p. 4, criticizing the "underwriting" by "New York State employers" of General Motors strikers through the payment to them of unemployment compensation benefits of up to $75 a week *in addition to* the welfare assistance that such strikers had already been receiving since the outset of that strike.

9. U. S. News & World Report, Oct. 3, 1960, p. 101.

10. Jones, *Copper Strikers Glum After 7 Months but Resolved Not to Quit*, New York Times, Feb. 13, 1968, p. 25, cols. 1-4.

> treasury . . . the generally low-paid postmen would soon suffer an intolerable financial squeeze and would therefore soon seek a compromise agreement. The British welfare state, however, has nullified that kind of cause-and-effect supposition."[11]

A recent study[12] indicates the substantial intrusion on free collective bargaining that results from the grant of welfare benefits to strikers. The study posits a situation where an employee strikes and forgoes weekly net pay of $91.35. In such a case, the study indicates that through a combination of union strike benefits, welfare benefits, food stamp subsidies and unemployment compensation, if the striker were a New York resident he would collect $15.65 *in excess of* his net weekly pay and, if a California resident, $41.65 *in excess of* his net pay prior to strike. As the study properly concludes:

> "Obviously, something is wrong with a system which rewards a man for walking off his job. Obviously, too, in any of the above cases the propensity to return to work is considerably diminished. The probability of a strike being long and its settlement costly and inflationary are proportionately increased."

3. When contrasted with the considerable frustration of federal labor policy occasioned by stripping the State of its neutrality in labor disputes, the competing state interest in providing welfare benefits to individuals who deliberately refuse available employment is insubstantial. First, the grant of assistance to families of the unemployed, the Massachusetts Aid to Families with Dependent Children (AFDC) statute primarily at issue here, does not involve "state action which takes the form of exercise of its historic powers" (App. Pet. p. A6). Conversely, the enabling

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11. Friendly, *No Early Settlement Seen in Britain's Postal Strike*, Washington Post, Feb. 19, 1971, p. A16, cols. 5-8.

12. Thiebolt and Cowin, *Food Stamps and Strikes: The Nature of Problem*, Industrial Research Unit, University of Pennsylvania's Wharton School of Finance and Commerce (February 1971).

federal legislation was adopted *in 1961* with the sole desire to provide aid to children whose fathers were unable to enter the labor market.[13]

There was no Congressional intent, in enacting AFDC, that aid be provided for the families of those who were without employment by their own choice. Congress did not intend either that public assistance funds be depleted, thereby jeopardizing the availability of such monies for those who were involuntarily out of work, in order that the Government might assist the efforts of the presently-employed to coerce from their employers higher wages or different working conditions or that an employer be required, in effect, to finance through his tax payments a strike against himself. It is for the same reasons, and because of the similar absence of any state interest, that a labor dispute exemption prevails in all state unemployment laws apart from New York and Rhode Island.[14]

Second, any state interest in "minimizing hardship . . . avoiding conditions that could lead to violence . . . [and] forestalling economic stagnation" (App. Pet. p. 7) by enabling strikers to receive welfare benefits is one which clearly has not been manifested in actual practice. Many states have no AFDC programs whatsoever.[15] One state

13. See, *e.g.*, Senate Committee on Finance Rep. No. 165, 87th Cong. 1st Sess. (1961), p. 3.

14. Haggart, *Unemployment Compensation During Labor Disputes*, 37 Nebr. L. Rev. 668, 687-9 (1958). Haggart notes that the basic British unemployment compensation legislation made "no provision whatever for the payment of benefits when unemployment was due to a labor dispute . . . the omission of this provision was consistent with the overriding, and perhaps exclusive, purpose of the original legislation—that of protecting workers from the effects of fluctuations in trade caused by cyclical economic conditions beyond the control of the individual . . . [This] doctrine of neutrality of the state has been approved by American courts . . ."

15. For example, Texas (Tex. Rev. Civ. Stat. Ann. Vol. 1B, Art. 695c, § 17 (1925)); Wisconsin (Wis. Stat. Ann. Vol. 7, § 49.17 (1950)); Virginia (Va. Code Ann. Vol. 9, Tit. 63, § 1-105 (1950)); New Hampshire (New Hamp. Rev. Civ. Stat. Ann. Vol. 2, ch. 167, § 43 (1942)); and Iowa (Ia. Code Ann. Vol. 11A, § 239 (1939)).

has specifically ruled that strikers are not covered by its various welfare statutes, holding that a "person who could work at his job, but goes on strike, cannot be deemed indigent or expect the public to support him and his strike."[16] There is no evidence of any greater hardship, strike violence or economic stagnation in such communities. Indeed, it is a basic tenet of our national labor policy "that free opportunity for negotiation . . . is likely to promote industrial peace" (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937)) and thereby preclude such concomitant effects of economic warfare. It surely defeats, rather than fosters, that goal to promote protracted labor strife through the availability of state aid to one of the combatants.

Finally, even if the decision below protects a legitimate state interest unrelated to labor-management relations, that fact is hardly dispositive. In *John Hancock Mutual Life Insurance Co.* v. *Commissioner*, 349 Mass. 390 (1965), a Massachusetts statute permitting the owners of debit life insurance policies an added grace period for payment of their premiums during a strike by the insurer's collecting agents was struck down as an invasion of the pervasive federal labor scheme, even though there was a legitimate state interest involved in protecting policyholders from forfeitures. There were similarly legitimate state concerns involved in the state enactments invalidated in *Nash* v. *Florida Industrial Commission*, 389 U. S. 235 (1967), and *General Electric Co.* v. *Callahan*, 294 F. 2d 60 (1st Cir. 1961). In each instance, however, since the state law "stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Nash*, 389 U. S. at 240), it was not permitted to stand.

4. As the court below recognized, "this is the first occasion on which a federal court has considered a confronta-

16. See the Opinion of the Iowa Attorney General dated February 16, 1971, reprinted as an Appendix hereto, at p. A4.

tion between the national policy of free collective bargaining and the administration of a state's welfare laws." App. Pet. p. A3-A4. It raises an issue—State rebalancing of the economic power of the adversaries to a labor dispute—that is of transcendent importance to the administration of federal labor law. It is also a question which, in view of the present national concern with respect to both the criteria of public assistance and the increasing volume and longevity of strikes, is of far-reaching significance. The instant case, therefore, is one which warrants review by this Court.

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APPENDIX

WELFARE: Limitations on Public Assistance to Strikers —§§ 234.11, 239.3, 249C.6 and Ch. 252, Code of Iowa, 1971. Food stamps available, if otherwise eligible, pursuant to Federal Food Stamp Act; Iowa recognizes the food stamp program in § 234.11; no ADC available under §239.3, if neither parent is incapacitated and both live in home; the single parent not entitled to assistance under § 249C.6, but possible personal allowances available to child; a veteran on strike is not entitled to Soldiers Relief for the "indigent" under § 250.1; a person on strike is not a "poor person" under Ch. 252, pertaining to general county relief. (Williams to Chalupa, Jasper County Attorney, 2/16/71) #71-2-40

February 16, 1971

Dennis F. Chalupa, Esquire
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Dear Mr. Chalupa:

You have requested an Opinion of the Attorney General as to:

> "Whether or not persons would be eligible, depending on their particular circumstances, for food stamps, aid to dependent children, soldier's relief or general relief, if they have no wages due to the fact that they are on strike and receive only strike pay from their union."

DIVISION I—FOOD STAMPS

The Food Stamp Act of 1964 (P. L. 88-525, 78 Stat. 703), authorizes the U. S. Secretary of Agriculture to formulate and administer a Food Stamp Program for the purpose of encouraging the increased utilization of the nation's abundance of food by raising levels of nutrition among low-income households. (Regulations were published December 30, 1970 in Vol. 35, Federal Register No. 252.) The Food Stamp Program is financed solely by the Federal Government with no state or local funds involved, and, although administered by the Iowa Department of Social Services and County Welfare Boards, it is regulated by the Federal Government. Iowa has recognized the program (§ 234.11, Code of Iowa, 1971), but has enacted no laws regulating it.

Pursuant to the above-cited federal regulations, the Iowa Department of Social Services establishes the income and resource eligibility limitations with approval of the U. S. Secretary of Agriculture. Persons, whether on strike or not, having income or resources in excess of these standards, are not eligible to receive food stamps; and when they apply or reapply for food stamps, the income which they received for the 30-day period prior to their application or reapplication is considered in making the determination for eligibility, including wages or striker's pay.

However, persons who meet the income and resources eligibility requirements and are on strike, may be certified to participate in the federal food stamp program.

DIVISION II—ADC ASSISTANCE

This program is designed to aid families with needy children where there is only one parent in the home or where there is an incapacitated father under the Federal

Social Security Act, Title 42 U. S. C., 602-644 and Chapter 239, 1971 Code of Iowa. Section 239.3, 1971 Code of Iowa defines a "dependent child" as:

> ". . . a needy child under the age of 16 or under the age of 21 and a student . . . who has been deprived of parental support and care by reason of death, continued absence from home, physical or mental incapacity, or unfitness of either parent . . ."

Therefore, if the child is living in the home where both the mother and father are residing, unless one is incapacitated, he is not eligible to receive ADC.

In the case of a single parent who is participating in a strike, that parent is disqualified from having access to and ADC funds. Section 249C.6, 1971 Code of Iowa, reads as follows:

> "Participation required. Each eligible person shall . . . accept any reasonably suitable employment . . . as a condition of receiving public assistance. If he fails or refuses to do so, he shall not receive public assistance. His disqualification shall not disqualify other members of his family who are entitled to public assistance, but their public assistance shall not be paid to the disqualified person and shall be paid in a manner which will not permit the disqualified person to have access to the assistance fund."

A person who goes on strike cannot be deemed to be cooperating or accepting reasonably suitable employment, and thus becomes ineligible to receive ADC payments. The portion of ADC payments which are paid solely for the children in the ordinary case where the parent is eligible must be paid to a guardian, duly appointed as provided by § 239.5, Code of Iowa, 1971.

DIVISION III—SOLDIERS RELIEF

The funds for Soldiers Relief are derived from county tax levies pursuant to Chapter 250, 1971 Code of Iowa, and this relief is jointly granted by the Board of Supervisors and the Soldiers Relief Commission for the purposes stated therein. Section 1, Chapter 250 provides that the fund shall be used:

> ". . . for the relief of and to pay the funeral expenses of honorably discharged, indigent men and women of the United States who served in the military or naval forces."

The word "indigent" as used in this chapter has been defined in two Attorney General's Opinions as follows:

1932 OAG, at page 164, reads in part:

> ". . . the term 'indigent' is used to refer to one's financial ability and ordinarily indicates one who is destitute of means of comfortable subsistence so as to be in want."

OAG 1919-1920 at page 702 reads in part:

> ". . . a person is indigent when they are not possessed of sufficient funds to comfortably provide for themselves . . .
>
> "Public funds should not be expended in assisting those who are able to care for themselves."

A person who could work at his job, but goes on strike, cannot be deemed indigent or expect the public to support him and his strike.

DIVISION IV—GENERAL RELIEF

General County Relief is granted pursuant to the provisions of Chapter 252, 1971 Code of Iowa, to persons defined as "poor". Section 252.1 defines a "poor person" as follows:

> "those who are unable because of physical or mental disability to earn a living by labor."

Persons on strike are not necessarily "poor", and they are not on strike because of physical or mental disability which prevents them from earning a living, but rather because they seek a better living. County General Relief is restricted to those who are unable, because of a physical or mental disability, to earn a living.

Respectfully submitted,

/s/ LORNA L. WILLIAMS,
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